

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2571

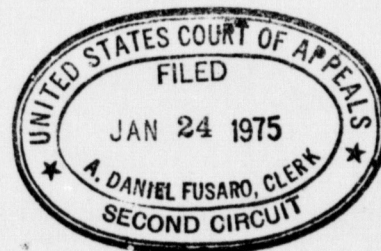
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -x
FRANCIS BLOETH, :
Appellant, :
-against- : No. 74-2571
ERNEST L. MONTANYE, Superintendent, :
Appellee. :
----- -x

APPENDIX

WILLIAM E. HELLERSTEIN
DAVID A. ENGLANDER
WARREN H. RICHMOND
Attorneys for Plaintiff-
Appellant
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
[212] 374-1737



PAGINATION AS IN ORIGINAL COPY

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*For the Court's convenience appellant has typed appellant's hand-written complaint.

C. Form No. 106 Rev.

Civ-1973-336

[illegible]

Civ-1973-335 Francis Bloeth

DATE	PROCEEDINGS	Date Order of Judgment Note
1973		
July 10	Filed Petition	
10	" Order allowing filing in forma pauperis; correctional officials ordered to show cause why petr. should not be allowed to proceed further in forma pauperis ret. 8/2/73	F-142
10	JS 5 made	
July 24	Filed Respondent's affidavit in opposition	
Aug. 2	Submitted	
Dec. 13	Filed order directing that further affidavit be filed explaining the present status of petr & some factual basis & shall be filed not later than 1-3-74-Curtin, DJ Notice & copies to Petr. & Louis J. Lefkowitz	F-147
1974		
Jan. 3	Filed supplementary affidavit in opposition.	
June 10	" Petitioner's Reply order dismissing petr's application, permission to appeal in forma pauperis is denied, with the qualification that petr. may file with the clerk notice of appeal w/o payment of fees-Curtin, DJ Notice & copies to Petr. & Louis J. Lefkowitz	F-153
7	JS 6 made	
19	Filed Petitioner's Notice of Appeal (copy mailed to Mr. Lefkowitz, Bflo., with copy of CCA Form C, and to Clerk, CCA with copy of docket entries and original Form C)	
Aug. 8	File sent to U.S. Court of Appeals	
Dec. 9	Filed copy of order of CCA granting Appellant's motion for leave to proceed in forma pauperis and for assignment of counsel	
10	Original papers, docket entries and Clerk's certificate mailed to Clerk, CCA	

June 15, 1973

Dear Judge Curtin:

I was at Attica during the Sept. 9-13, 1971 incident and therefore believe I am entitled to coverage of the injunction issued against harassment by officials here.

The facts are thus:

I was transferred out of Attica in 1972 to Green Haven Facility [8-4-72].

I was transferred from Green Haven to Clinton Facility in December, 1972. [I had no disciplinary reports while at Green Haven.]

I was transferred from Clinton to the A.C.T.E.C. Rx Prescription Program on March 28, 1973. I had no disciplinary reports while at Clinton Facility. Civil Action on that issue is pending trial at Federal Court in Albany.

I was transferred, over my objection, from the Rx Program to Attica Facility on June 14, 1973 and placed in A-Block Reception Co. None of my personal or Legal property was transferred with me.

I received no disciplinary reports while at A.C.T.E.C.

On June 15, 1973 I was taken from A-Block and placed in H.B.Z. [Protective Custody] by order of Supt. Montanye and Dep. Supt. Smith.

Upon arrival at H.B.Z. I was told to strip for a frisk. This I did. Upon being told to expose my rectum for a visual search, I informed the officials that as I had not submitted to a visual or other type rectal search since 1972, I declined to do so because of the degrading nature of the search. Additionally, I had been sleeping in my A-Block cell and watched continuously until arrival at H.B.Z. and it would have been impossible, even if I had wanted to, to insert any weapon in my rectum. Sgt. Quinn was present at all times from when I awoke in A-Block until K.L. in H.B.Z.

The officer at H.B.Z. told the Sgt. I refused to submit to the visual or otherwise rectal search. The Sgt. said I would be Keep Locked for refusing a direct order.

After several minutes of futile discussing as to whether the report should indicate exactly what order I rebelled against - I was taken to a cell in H.B.Z.

Sir; I fell that the action of the authorities-Supt. and Dep. Supt.

1. placing me in H.B.Z. without a hearing,
2. Not informing me of any charges; and,
3. Keep Locking me for objecting to a degrading order, entitles me to relief.

Furthermore, I was sent to Attica with an Evaluation Report showing I had an I.Q. at 138 and recommending that I be given a College Program and work in The Law Library.

This recommendation was approved by the Commissioner of Correctional Services and was not subject to revision by anyone without his [Commissioner Preiser's] approval.

I ask that this Court grant me leave to proceed and assign counsel to institute an action under 18 U.S.C. 1983 and 42 U.S.C. 1942 for injunctive and other relief including damages.

The action taken here is purely arbitrary and capricious and taken without any authority for, as noted above, I was to receive an education, not Keep Locked in H.B.Z.

I believe I am entitled to relief, have no personal property or anything here. My property is still at A.C.T.E.C. facility.

Kindly accept this document and assign me an attorney to order the officials to release me immediately from H.B.Z. and conform with the program set up for me by Commissioner Preiser.

Very truly yours,

FRANCIS BLOETH

FRANCIS BLOETH
26718-Rx28

To: Hon. John T. Curtin, Judge
U.S. District Court
United States Court House
Buffalo, N.Y. 14202

From: Salvador Agron #28298
Box 149
Attica, New York 14011
6/15/73

Honorable Sir:

Enclosed herewith please find a letter from Mr. Frank Bloeth. He just got here from Adirondack and being that the rules here at Attica says that for legal mail to go out one must have stamps: He has no present stamp account so I am doing him the favor of enclosing his letter to you in this envelope because I have a stamp account. Otherwise his letter cannot get to you.

Respectfully,

SALVADOR AGRON #28298

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In The Matter Of The Application of
Francis Bloeth

Petitioner pro se

Petitioner, currently confined at the Attica Correctional Facility, has submitted a communication to this Court that will be treated as an application for relief under the Civil Rights Act (42 U.S.C. §1983; 28 U.S.C. §1343).

Petitioner alleges that he was placed in "HBZ (protective custody)" without a hearing and without being informed of the charges against him.

Filing in forma pauperis is permitted.

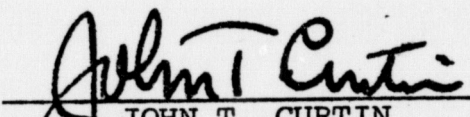
Correctional officials are ordered to show cause on August 2, 1973, at 10:00 a.m. in Part II of this court, at Buffalo, New York, why petitioner should not be allowed to proceed further in forma pauperis. Petitioner need not be present at that time. The answering affidavit should contain detailed and specific facts relating to petitioner's confinement including a statement of the facts upon

-2-

which the decision to confine petitioner in a segregation unit was based. Respondent should also state whether Department of Corrections procedures pertaining to prisoner disciplinary hearings were followed and describe the safeguards provided petitioner at any hearings held. The answering affidavits should also conform to this court's order in Morgan v. Oswald, Civil No. 1973-151 (W.D.N.Y. May 17, 1973).

Answering papers shall be served upon petitioner and he shall have 20 days to respond in writing if he so desires.

So Ordered.



JOHN T. CURTIN
United States District Judge

Dated: July 9, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRANCIS BLOETH

Petitioner,

CIV-1973-336

- vs -

AFFIDAVIT IN
OPPOSITION

ERNEST L. MONTANYE, Superintendent
of Attica Correctional Facility,
Attica, New York,

Respondent.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

DOUGLAS S. CREAM, being duly sworn, deposes and says:

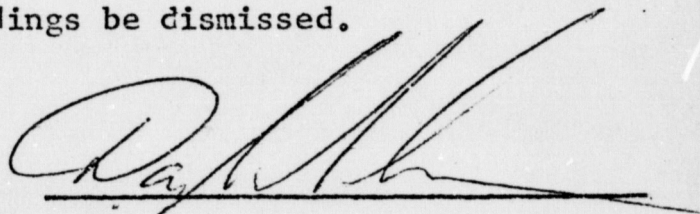
He is an Assistant Attorney General of the State of New York, of counsel to LOUIS J. LEFKOWITZ, Attorney General of the State of New York and attorney for the Respondent, and he is familiar with the petition herein.

Respectfully submitted is the affidavit HAROLD SMITH, Deputy Superintendent at the Attica Correctional Facility, sworn to the 20th day of July, 1973, with Attachments annexed thereto, in opposition to the petition herein, and it is

FURTHER submitted that the said affidavit adequately and fairly answers the claims herein made by the petitioner.

A copy of this affidavit has been mailed to petitioner.

WHEREFORE, your deponent prays that the application herein be denied and that the proceedings be dismissed.



Subscribed and sworn to before me
this 24th day of July, 1973.

Patricia A. Kalinowski
Comm'r. of Deeds, Buffalo, N.Y.
Comm. expires December 31, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RECEIVED

JUL 23 1973
N. Y. S. DEPT. OF LAW
BUFFALO OFFICE

Francis Bloeth

Petitioner

vs

CIV-1973-336

Ernest L. Montanye, Superintendent
of Attica Correctional Facility,
Attica, New York

Respondent

STATE OF NEW YORK)
COUNTY OF WYOMING) SS:

Harold Smith, Deputy Superintendent, of Attica Correctional Facility, being duly sworn, deposes and says, that he is over the age of twenty-one and resides on institutional property in Attica, New York. The above named petitioner was transferred to this facility on June 14, 1973, from Adirondack Correctional Treatment and Evaluation Center. Before his transfer from that facility the petitioner indicated that he preferred to go to Green Haven Correctional Facility as he felt that he might have problems in Attica. On June 15, 1973, I recommended that petitioner, Francis Bloeth be placed in HBZ, Protective Custody. The basis for this assignment was that the petitioner has made a rather poor institutional adjustment during the years of his incarceration and he has compiled numerous disciplinary reports. The petitioner is in constant defiance of institutional regulations and rules both in this facility and other facilities throughout the State. He presents a clear and eminent danger to the facility, its employees, and inmates because of his past actions and current attitude. We are also attaching hereto copies of form 251-C, pages 1 & 2, relative to Protective Admission and Custody Assignment Review. The petitioner Francis Bloeth

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received a copy of this form on June 15, 1973, which indicated to him why he was being placed in Protective Custody. I am personally seeing petitioner Francis Bloeth every week and when, as a result of our discussions, I feel that it would be to the advantage of petitioner Bloeth, and the facility for him to return to regular population, I will certainly recommend it.

Harold Smith
Harold Smith
Deputy Superintendent

Sworn to before me this
20 day of July, 1973

Rita Steggs
Notary Public

RITA STEGGS
Notary Public, State of New York
No. 9165260
Qualified in Westchester County
Commission Expires March 30, 1974

ATTICA CORRECTIONAL FACILITY

CONFIDENTIAL

PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT REVIEW

SUPERINTENDENT'S REVIEW

NAME: Francis H. Bloath NUMBER: T-24713

DATE OF REVIEW OF PAGE I AND TRANSMITTAL TO INMATE WITH COPY OF FORM 251-C-I:

SUPERINTENDENT'S FINDINGS: I find that the information presented is:

(a) Substantial and hereby confirm such assignment YYY

(b) Insufficient for such assignment _____ and

recommend: (1) Assignment in general population, this

facility _____; or (2) Transfer to another facility

_____;

SUPERINTENDENT'S SIGNATURE: Eugene L. Montenegro, M.D.

DATE OF SUPERINTENDENT'S FINDING: June 15, 1973

DATE OF NOTIFICATION TO INMATE OF SUPERINTENDENT'S FINDING:

June 15, 1973 BY [Signature] Correction Sergeant
(Employee Signature and Title)

DATE OF TRANSMITTAL TO COMMISSIONER OF CORRECTIONAL SERVICES:

JUN 21 1973

ATTICA CORRECTIONAL FACILITY

Form 251-C-1

INMATE RESPONSE TO PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT

NAME Francis H. Bluth NUMBER 7-26713

I hereby consent to protective admission and custody assignment in a special housing and program unit. I understand that I may at any time make a written request to the Superintendent for reassignment to the general population and that I will be reassigned within two weeks from the date such request is made unless there is substantial evidence that continuation of protective custody is necessary.

SIGNATURE: _____

DATE: _____

I hereby do not consent to protective admission and custody assignment in a special housing and program unit. *I have no knowledge of what Departmental regulation I have violated*
I have been advised that I have the right to communicate with the Commissioner with respect to this matter via the attached envelope addressed to the Commissioner and letterhead provided. *However, I have no funds for stamps*

SIGNATURE: Bluth

DATE: 4/20/73

NOTICE: You are not required to make any statement in response to the information presented on Form 251-C. You may present immediately in writing any explanation or information which you want to be considered by the Superintendent in regard to the information presented on Form 251-C.

ATTICA CORRECTIONAL FACILITY

The Protective Admission and Custody Assignment Review Form (251-C) was presented to Francis W. Blooth T-26723
At Attica Correctional Facility on 6/25/73
A copy of form 251-C (Inmate Response) was also delivered at this time. The contents of each form was fully explained to subject inmate and he was given the opportunity to have any further questions answered.

Signature

W. J. Blane

Title

Corr. Sgt.

NOTE:

PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT REVIEW

NAME: Francis H. BloethNUMBER: 7-26708

CURRENT OFFENSE DATA: The inmate was received at Ossining Correctional Facility for Murder, 1st Degree sentenced to execution, commuted to Natural Life (Chapter 292, 40-0/Life) amended 343-11-72 to Murder, 1st Degree with a sentence of 20 to Life verdict, Jail time 276 days and 197 days. Shot and killed Irene Currier, restaurant, night, gun, stick-up, \$160.00. Minimum, 8/5/79. Maximum Life.

CRIMINAL BACKGROUND: Lengthy criminal history dating back to March 8, 1943 as a delinquent child. Since that time he has been in and out of numerous Correctional Facilities. His Criminal history indicates this man is assaultive.

PERSONAL HISTORY BACKGROUND: According to verified records, this inmate was born in Queens, on June 16, 1932. Bloeth is the third of 8 children born to Francis Bloeth and Mary Meyers, natives of New York City. Married he resided in NYC until 1958 and he resided in Suffolk County from that period until his arrest in 1959. Bloeth is Roman Catholic and has had formal training but he does not attend services. ~~REDACTED~~

INFORMATION BASIS FOR PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT: This individual has made a rather poor institutional adjustment during the years of his incarceration and has compiled numerous disciplinary reports. He is in constant defiance of institutional rules and regulations. This inmate has been placed in Protective Administrative Custody because of his previous involvement in this Facility and other Facilities throughout the state. He presents a clear and eminent danger to the facility, its employees, and inmates because of his past actions and current attitude.

SUBMITTED BY: 151 Gerald R. Elmore

(Employee Signature and Title)

SUBMISSION DATE: _____

facilities throughout the State. He presents a clear and eminent danger to the facility, its employees, and inmates because of his past actions and current attitude.

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DIVISION OF IDENTIFICATION
ALBANY, N. Y.

WARDENS OFFICE
SING SING PRISON

This certifies that fingerprints of the following named subject have been compared and the following is a true copy of the records of this Division.

250031 K FBI 5932 5-11

3/13/59

Paul D. McCann
Director

D. C. I. NO.

CONTRIBUTORS OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
...	--	3/8/43	Del child	Probation
...	--	3/22/45	Del child	Lincoln Hall- Dis 6/17/46.
... (Harris Refy)	--	10/31/46	J.D.	-
... (Harris Center)	--	3/5/47	Burglary (juv del)	Held to NYSID. Warwick NY
... (Harris NY)	Frank Henry Bloeth --	4/22/47	Burglary (J.D.)	Held to NYSID, Warwick NY
... (Harris NY)	Frank Henry Bloeth K 7292	Sent & recd 12/15/49	Wayward Minor	3-0-0 (Orange Co) Trans to NYSID 6902, disch by Exp 12/14/51.
... (Harris NY)	Francis Henry Bloeth 3976	10/9/52	Grand larceny-auto (final chg GL 2nd)	6/16/53 Harris Refy
... (Harris NY)	Francis Henry Bloeth 319479	12/6/52	Grand larceny (auto)	consolidated arrest of 12/3
... (Harris Refy)	--	1/31/53	Assault	Dis
... (Harris NY)	Francis Henry Bloeth 53202	sent 6/16/53 recd 6/19/53	Grand larceny 2nd	3-0-0 (Orange Co) continued on p 2

*Represents notations unsupported by fingerprints in D. C. I. files.
Please advise if we can be of any further assistance to you in this matter.

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DIVISION OF IDENTIFICATION
ALBANY, N. Y.

This certifies that fingerprints of the following named subject have been compared and the following is a true copy of the records of this Division.

Paul D. McNamee
Director

D. C. I. NO.

CONTRIBUTORS OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
	Francis Gary W...	1/20/52		(see also 1/20/52) State of New York 1/20/52 per 1/20/52 March 1/20/52 1/4/53
	Francis E. ...	1/20/52	Admission to Central Islip State	Married
	Francis Gary W...	1/20/52	Burglary 2nd (Class. 1st. Article 3)	1/20/52 on page 3 production
	Francis Gary W...	1/20/52	Burglary 2nd 1/20/52	Sing Sing on on page 3
	Francis Gary W...	1/20/52	Burglary 2nd 1/20/52	Sing Sing on on page 3
	Francis Gary W...	1/20/52	Burglary 2nd 1/20/52	Sing Sing on on page 3

*Represents notations unsupported by fingerprints in D. C. I. files.
Please advise if we can be of any further assistance to you in this matter.

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DIVISION OF IDENTIFICATION
ALBANY, N. Y.

This certifies that fingerprints of the following named subject have been compared and the following is a true copy of the records of this Division.

Paul D. McCann
Director

D. C. I. NO. 651031 N NY 3938 5-23

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CONTRIBUTORS OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Sing Sing Erison Oranburg, NY	Francis Henry Bloeth 125996	sent & recd 5/16/60	Vd Murder 1st B.Vd Robb 1st	A. Execution B. 12-0/39-0 (Suffolk County) Disch. by Revers of Judgment 4-25-63
Sing Sing Erison Oranburg, NY	Francis Henry Bloeth 132713	sent-11-8-63 recd-11-8-63	Vd. Murder 1st. (2 cts)	Execution (New York Co.)

*Represents notations unsupported by fingerprints in D. C. I. files.

Please advise if we can be of any further assistance to you in this matter.

ATTICA CORRECTIONAL FACILITY

CONFIDENTIAL

PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT REVIEW

SUPERINTENDENT'S REVIEW

NAME: BLOETHI, Francis NUMBER: T-26713

DATE OF REVIEW OF PAGE I AND TRANSMITTAL TO INMATE WITH COPY OF FORM 251-C-I:

SUPERINTENDENT'S FINDINGS: I find that the information presented is:

- (a) Substantial and hereby confirm such assignment XXX
- (b) Insufficient for such assignment _____ and
- recommend: (1) Assignment in general population, this
- facility _____; or (2) Transfer to another facility
- _____;

SUPERINTENDENT'S SIGNATURE: Ernest A. MontoyaDATE OF SUPERINTENDENT'S FINDING: June 27, 1973

DATE OF NOTIFICATION TO INMATE OF SUPERINTENDENT'S FINDING:

June 27, 1973

BY

Ad. Hesse

Correction Sergeant

(Employee Signature and Title)

DATE OF TRANSMITTAL TO COMMISSIONER OF CORRECTIONAL SERVICES:

JUL 5 1973

ATTICA CORRECTIONAL FACILITY

Form 251-C-1

INMATE RESPONSE TO PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT

NAME BLOETH, Francis NUMBER T-26

I hereby consent to protective admission and custody assignment in a special housing and program unit. I understand that I may at any time make a written request to the Superintendent for reassignment to the general population and that I will be reassigned within two weeks from the date such request is made unless there is substantial evidence that continuation of protective custody is necessary.

SIGNATURE: _____

DATE: _____

I hereby do not consent to protective admission and custody assignment in a special housing and program unit.

I have been advised that I have the right to communicate with the Commissioner with respect to this matter via the attached envelope addressed to the Commissioner and letterhead provided.

SIGNATURE: _____

DATE: _____

NOTICE: You are not required to make any statement in response to the information presented on Form 251-C. You may present immediately in writing any explanation or information which you want to be considered by the Superintendent in regard to the information presented on Form 251-C.

At 11:00 AM, today, 6/27/73, T-26718 Francis Bloeth refused to sign Form 251-C-1 in any place.

A. Bloeth

ATTICA CORRECTIONAL FACILITY

CONFIDENTIAL

PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT REVIEW

SUPERINTENDENT'S REVIEW

NAME: BLOETH, Francis NUMBER: T-26713

DATE OF REVIEW OF PAGE I AND TRANSMITTAL TO INMATE WITH COPY OF FORM 251-C-I:

SUPERINTENDENT'S FINDINGS: I find that the information presented is:

- (a) Substantial and hereby confirm such assignment XXX
- (b) Insufficient for such assignment _____ and
recommend: (1) Assignment in general population, this
facility _____; or (2) Transfer to another facility
_____;

SUPERINTENDENT'S SIGNATURE: Earnest D. MontoyaDATE OF SUPERINTENDENT'S FINDING: July 11, 1973

DATE OF NOTIFICATION TO INMATE OF SUPERINTENDENT'S FINDING:

July 11, 1973 BY J. Walker Correction Sergeant
(Employee Signature and Title)

DATE OF TRANSMITTAL TO COMMISSIONER OF CORRECTIONAL SERVICES:JUL 11 1973

Form 251-C-1

INMATE RESPONSE TO PROTECTIVE ADMISSION AND CUSTODY ASSIGNMENT

NAME BLOTH, FrancisNUMBER T-26718

I hereby consent to protective admission and custody assignment in a special housing and program unit. I understand that I may at any time make a written request to the Superintendent for reassignment to the general population and that I will be reassigned within two weeks from the date such request is made unless there is substantial evidence that continuation of protective custody is necessary.

SIGNATURE: _____

DATE: _____

I hereby do not consent to protective admission and custody assignment in a special housing and program unit. *I shll don't know what rule I violated since arrived at Attica on June 14, 1973*

I have been advised that I have the right to communicate with the Commissioner with respect to this matter via the attached envelope addressed to the Commissioner and letterhead provided.

SIGNATURE: FB BlothDATE: 7/11/73

NOTICE: You are not required to make any statement in response to the information presented on Form 251-C. You may present immediately in writing any explanation or information which you want to be considered by the Superintendent in regard to the information presented on Form 251-C.

_____, being duly sworn, deposes and says:
That he is an officer of the State of New York, to wit, an Assistant Attorney General; that he is representing the respondent herein as attorney; that he has read the foregoing return and knows the contents thereof, and that the same is true to the best of his knowledge and belief, and that

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of the Application of

FRANCIS BLOETH

Civil 1973-336

Petitioner pro se.

In response to this court's order of July 9, 1973, respondents have submitted an affidavit from Harold Smith, then Deputy Superintendent of the Attica Correctional Facility, sworn to on the 20th day of July, 1973, with attachments. The affidavit of Deputy Superintendent Smith explains that he recommended petitioner for protective custody status in HBZ because petitioner indicated that he might have problems at Attica, and because of the petitioner's prior poor institutional adjustment. Deputy Superintendent Smith stated that he will return the petitioner to regular population when he feels it is advisable to do so. The petitioner has not filed an answer to the affidavit of the Deputy Superintendent.

In his original petition, petitioner stated that during his stay at Green Haven Facility from August 1972 until December 1972, at Clinton from December 1972

-2-

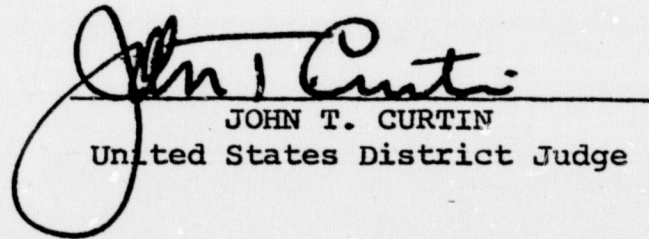
until March 1973, and at the Adirondack Treatment and Evaluation Center from March 1973 until June 1973 when he was transferred to Attica, no disciplinary reports were filed against him. He claims that none of his personal or legal property was transferred with him during his transfer from Adirondack to Attica. At least for that period of time, the representation made by petitioner does not seem to square with the information received from Deputy Superintendent Smith that the petitioner had compiled numerous disciplinary reports and that he is in "constant defiance of institutional regulations and rules, both in this facility and other facilities throughout the state."

The court directs that a further affidavit be filed explaining the present status of petitioner and some factual basis for the judgment made that "he presents a clear and imminent danger to the facility, its employees, and inmates because of his past actions and current attitude." This affidavit shall be filed not later than January 3, 1974 and served upon petitioner, who shall have an opportunity to respond if he so

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desires within ten days.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: December 13, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRANCIS BLOETH,

Petitioner,

- vs -

SUPPLEMENTARY
AFFIDAVIT IN
OPPOSITION

ERNEST L. MONTANYE, Superintendent
of Attica Correctional Facility,
Attica, New York,

CIV-1973-336

Respondent.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

DOUGLAS S. CREAM, being duly sworn, deposes and says:

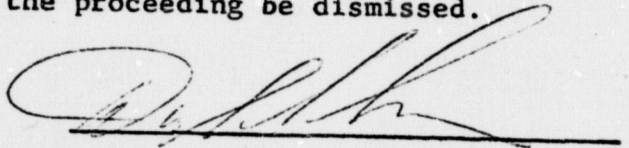
He is an Assistant Attorney General of the State of New York, of counsel to LOUIS J. LEFKOWITZ, Attorney General of the State of New York and attorney for the respondent, and he is familiar with the petition herein.

Respectfully submitted is the supplementary affidavit of HAROLD J. SMITH, Superintendent of Attica Correctional Facility, sworn to the 2nd day of January, 1974, in opposition to the petition herein, and it is

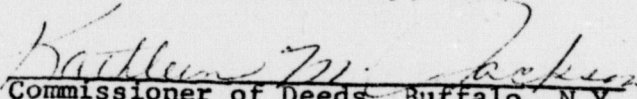
FURTHER submitted that the said affidavit adequately and fairly answers the claims herein made by the petitioner.

A copy of this affidavit has been mailed to petitioner.

WHEREFORE, your deponent prays that the application herein be denied and that the proceeding be dismissed.



Subscribed and sworn to before me
this 3rd day of January, 1974.


Commissioner of Deeds, Buffalo, N.Y.
Commission expires December 31, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In The Matter of The Application

of

CIV-1973-336

Francis Bloeth, T-26718

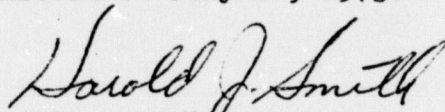
STATE OF NEW YORK }
COUNTY OF WYOMING } ss:

HAROLD J. SMITH, Superintendent of Attica Correctional Facility being duly sworn, deposes and says, that he is over twenty-one years of age and resides on institutional grounds in Attica, New York.

Our records indicate that petitioner FRANCIS BLOETH was in Green Haven Correctional Facility on August 3, 1972. Transferred to Clinton Correctional Facility on December 22, 1972, transferred to ACTEC on March 29, 1973, transferred to Attica on June 14, 1973. Petitioner FRANCIS BLOETH is now at Auburn Correctional Facility being transferred to that facility on July 20, 1973. Record card also indicates that on 2/19/73 while at Clinton shows that petitioner was under investigation. On 5-11-73 while at ACTEC petitioner refused a direct order from Correction Officer to submit to a rectal examination. Also on 5-11-73 at ACTEC - during a search double edge razor blade was found in his cell. On 5-17-73 petitioner appeared before the Adjustment Committee and was cautioned that in the future no isolated blade would be kept in his cell - he was counselled no further action deemed necessary. The above record indicates that the petitioner did have reports at other facilities and his petition definitely stated he had no disciplinary reports at other facilities. Our previous affidavit sent to the Court on July 20, 1973 with attachments showing inmates past criminal history as being evidence that the petitioner presented a clear and imminent danger to the facility, its employees and inmates because of past actions

-2-

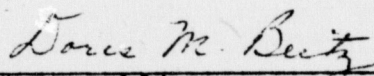
and attitude of petitioner. Misbehavior reports plus petitioners criminal history was forwarded to the Court on the original affidavit submitted on July 20, 1973.



HAROLD J. SMITH
Superintendent

Sworn to before me this

2 day of January, 1974



Notary Public

DORIS M. BEITZ
Notary Public, State of New York
No. 5240710
Qualified in Wyoming County
Commission Expires March 30, 1974

Please consider this document as a Proof of Service and as an informative paper for Judge Curtin.

Cir 73/336

STATE OF NEW YORK:

: ss.:

COUNTY OF CALUGA::

Francis Bloeth being duly sworn deposes and says that he has sent to this Court 3 copies of the following:

Response to Respondents opposition

Affidavit in support of response.

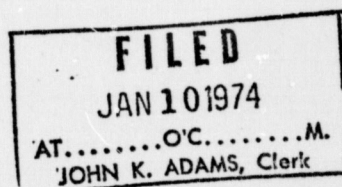
Affiant requests that the Clerk forward a copy to each of the respondents herein, (Montanye and Smith) and file the other with this Court.

FURTHER, affiant has enclosed an affidavit to be submitted to this Court as information as to why affiant was unable to file an opposition to respondents original affidavit and has insufficient information in his position to prove the falsity of Mr. Smith's present affidavit.

Francis Bloeth
Francis Bloeth

Subscribed and sworn to before me
this 8th day of January, 1974.

Elaine A. Graves
Notary Public



ELAINE A. GRAVES
Notary Public, State of New York
City of Albany #1436
My Comm. expires March 30, 1975

RECEIVED

JAN 10 1974

JOHN T. CURTIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

Francis Bloeth, the below signed affiant, wished to submit the following information for this Court's personal knowledge as to why no response was submitted against the affidavit sent to this Court by Harold Smith on July 20, 1973.

A F F I D A V I T

STATE OF NEW YORK:

:ss.:

COUNTY OF CAYUGA:

Francis Bloeth beingduly sworn deposes and says:

That, during July, 1973 Mr. Danny Weinstein from the Legal Aid in Buffalo, N.Y. came to see me.

That, he asked for and received all the documents I had accumulated for use in responding to denials I knew would come from Respondents Montanye and Smith about the reasons for my being placed in segregation.

That, he stated that he would handle things for me and not to worry.

That, on July 28, 1973 I received the respondents reply and forwarded same to Mr. Weinstein, Esq. 205 Walbridge Bldg.

Buffalo, N.Y.. I requested that he reply to that affidavit as I felt that it offered nothing to justify my being placed in H.B.Z. for 35 or 36 days.

That, on November 6, 1973 I sent a letter to Mr. Weinstein asking if he had received the document sent in July and if any reply had been filed by him. I also requested a copy of said reply.

That, on December 17, 1973 I sent a letter to Mr. Weinstein calling to his attention my letter of November 6th, and that he had failed to file any reply. I thereupon requested that he forward to me all the material he had on this issue which I had either sent or mailed or gave to him as I felt that I would need such documents by January 3, 1974.

That I sent Mr. Weinstein a copy of this Court's order directing further reply by the respondents and allowing me until January 10, 1974 to reply.

That, Mr. Weinstein had neither acknowledged the communications forwarded to him nor has he returned them to me.

WHEREFORE, affiant respectfully prays that this Court direct Mr. Danny Weinstein to return to affiant all the documents in his possession related to the suit against the respondents and if deemed necessary, to explain to this Court why he had so callously disregarded affiant after representing that he would undertake to file responses to any reply filed by the respondents in this matter.

Francis Bloeth
FRANCIS BLOETH

Subscribed and sworn to before me
this 2nd day of January, 1974.

Elaine A. Graves
NOTARY PUBLIC

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission expires March 30, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X

In the Matter of the Application :

of : RESPONSE TO SUPPLEMENTARY
FRANCIS BLOETH : AFFIDAVIT OF OPPOSITION

-----X

Civ.-1973-336

STATE OF NEW YORK:

: ss.:

COUNTY OF CAYUGA :

FRANCIS BLOETH, being duly sworn, deposes and says:

He is the above named applicant and submits the attached affidavit in response to the supplementary affidavit of Counsel Douglas S. Cream and Superintendent Harold J. Smith delivered to affiant on the 7 day of January, 1974.

FURTHER submitted is that contrary to what Counsel Cream has stated, the affidavit of Superintendent Smith does not adequately nor fairly answer the claims made by affiant and affiant is entitled to damages and other relief.

WHEREFORE, affiant prays that the application and relief be granted and that the respondents be held responsible for their arbitrary and unconstitutional treatment of affiant, and for such other and further relief that as to this Court may seem just and proper.

Francis Bloeth
Francis Bloeth 65067
Auburn Corr. Facility
Auburn, New York

Subscribed and sworn to before me this

8th day of January, 1974.

Elaine A. Graves
NOTARY PUBLIC

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X

In the Matter of the Application :
of : Civ.-1973-336
FRANCIS BLOETH : (Affidavit)

-----X

STATE OF NEW YORK:
:ss.:
COUNTY OF CAYUGA::

FRANCIS BLOETH, being duly sworn deposes and says:

FIRST: That, the affidavit of Harold Smith in no way shows that affiant "presented a clear and imminent danger to the facility, its employees and inmates because of past actions and attitude".

SECOND: That, while the "record card" could very well "indicate that on 2/19/73 while at Clinton petitioner was under investigation" that is evidence of nothing. It merely asserts that someone at Clinton prison filed an action similar to the one being challenged herein and fails to call to the attention of this Court that the 'investigation' of petitioner and the treatment he received thereon is in the hands of Federal Judge Foley, N.D.N.Y. and is handled by the Legal Aid Society, 119 Fifth Avenue, New York, N.Y..

The respondent's affidavit also fails to state that there was no disciplinary report or action taken against relator in Clinton although he was placed in Unit 14 (the Box) for 35 days without cause. Damages are being sought for that action.

THIRD: That affiant denies the allegation that he was placed on report on 5-11-73 for refusing to submit to a rectal examination, was never informed of any such disciplinary report, nor was he taken before any adjustment committee for any such report. That, a razor blade was taken from affiant while in A.C.T.E.C. but, relator had explained that he was given the blade for shaving and was told that he should have turned it in when he had finished using it. He was informed that no disciplinary report would be filed as he was unaware that he

had done any wrong.

Further, a report filed on May 14, 1973 at A.C.T.E.C. stated as follows:

"DAILY CONDUCT: Conduct and attitude are rated average." Others who were at A.C.T.E.C. who had received disciplinary reports had ~~such~~^{report} noted in the area quoted above concluding that the respondent's conclusion that affiant had disciplinary reports are in error. For all charges there must be a hearing and a conviction with punishment. Reported notations by some unknown are evidence of nothing.

FOURTH: That, as of July 20, 1973 the date the respondent filed with this Court "attachments" with this affiant's "past criminal record, affiant had been incarcerated continuously for a period of 13 years and 10 months-having been arrested on August 10,,1959- which refutes the contention that he is to be judged on the basis of a record of criminal activity which ended 14 years earlier.

Furthermore, if respondents felt this way about affiant, how can it be explained that from February 1971 until August 1972-at which time he was transferred to Green Haven- affiant was not kept in H.B.Z. as a threat, etc. and in fact, after the riot of September 1971 was working as the Kitchen Clerk from January 1972 until his transfer and was one of only six inmates who had institution passes which enabled him to move throughout the facility unescorted at all times.

Affiant reiterates that he was arbitrarily and capriciously punished and deprived of the rights to socialize, go to school, work, go to religious services, recreation and mix with the general population and that this blemish, if allowed to remain on his record will adversely affect his opportunity for parole.

For these reasons and those arrived at by this Court after considering all the ramifications therein, affiant prays that this Court grant monetary damages and order the conclusions of Superintendent^{ants} Montanye and Smith that affiant is a dangerous prisoner expunged from all his records.

WHEREFORE, affiant prays that this Court will grant the

relief sought herein and whatever other and further relief that to this Court may seem just and proper.

Francis Bloeth

Francis Bloeth 65067
Auburn Correctional Facility
Auburn, New York

Subscribed and sworn to before me
this 8th day of January, 1974.

Elaine A. Graves

NOTARY PUBLIC

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of the Application of

Civil 1973-336

FRANCIS BLOETH

Petitioner pro se.

In response to this court's order of December 13, 1973, respondents have submitted affidavits from Douglas S. Cream, Assistant Attorney General of the State of New York, and Harold J. Smith, Superintendent of Attica Correctional Facility. Petitioner has submitted a reply.

Superintendent Smith's affidavit states that on February 19, 1973, while at the Clinton Correctional Facility, petitioner was under investigation. On May 11, 1973, while at the Adirondack Correctional Treatment and Evaluation Center, petitioner refused a direct order from a correctional officer to submit to a rectal examination. Also on May 11, 1973, while at the Adirondack Facility, a double-edge razor blade was found in petitioner's cell during a search of that cell. This disciplinary history, combined with the correctional authority's

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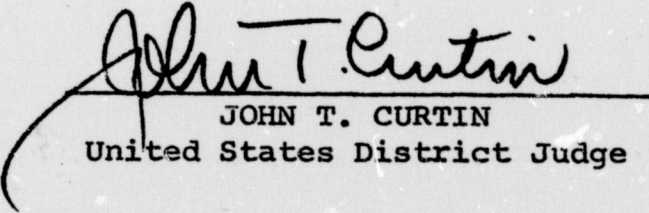
review of petitioner's criminal record, led them, according to the affidavit of Superintendent Smith, to recommend that petitioner be placed in protective custody. Petitioner's reply does not controvert any of these facts. The incident regarding the rectal search was mentioned in his original petition and, while petitioner disagrees with the action taken by correctional authorities in this instance, as well as the other instances mentioned in Superintendent Smith's affidavit, petitioner does not deny that these incidents occurred. Petitioner states that he does not believe his criminal record should be used in making a decision to confine him to protective custody, but he does not disagree that his criminal record is as appears in the records attached to Superintendent Smith's answering affidavit. Based on these facts, the court finds that the action taken by prison authorities was within the discretionary authority normally given them in the area of prison administration. See Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). Thus, petitioner's application must be dismissed.

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Permission to appeal in forma pauperis is also denied, with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal, without the payment of filing fees.

Further requests for permission to appeal in forma pauperis should be directed, on motion, to the United States Court of Appeals for the Second Circuit, Foley Square, New York City, in accordance with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: June 7, 1974

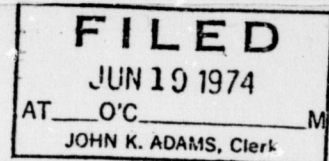
CERTIFICATE OF SERVICE

This is to certify that I have this 24th day of January, 1975, served a copy of the foregoing Brief for Plaintiff-Appellant and Appendix on the appellee by mailing, via United States Mail, postage prepaid, a copy of the same to Arlene Silverman, Assistant Attorney General for the State of New York, attorney for appellee, at Two World Trade Center, New York, New York 10047.

David A. Englander

DAVID A. ENGLANDER
Attorney for Plaintiff-Appellant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



-----: :
In the Matter of the Application of x
FRANCIS BLOETH, : Civil-1973-336
-----x

SIRS:

PLEASE TAKE NOTICE, that upon all papers and proceedings heretofore had herein, Francis Bloeth, the above entitled applicant does hereby serve notice of his intention of filing an appeal of the decision and Order of Judge John T. Curtin, U.S.D.J.-W.D.N.Y. entered in the Office of the Clerk of the United States District Court, Western District of New York on the 7th day of June 1974, dismissing his application for relief pursuant to the Civil Rights Statutes '28 U.S.C. 1343 and 42 U.S.C. 1983' seeking damages for the denial of due process of law and equal protection of law which occurred when plaintiff was placed in segregation for 35 days without constitutionally required procedures by defendants Ernest Montanye and Harold Smith as Superintendent and Deputy Superintendent of Attica Correctional facility.

DATED: June 15, 1974

Yours , etc.,

Francis Bloeth
Francis Bloeth #65067
Auburn Correctional Facility
Auburn, New York

